



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2001 Assembly Bill 322	Assembly Substitute Amendment 1
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Contact: Rachel E. Letzing, Staff Attorney (266-3370)	

Assembly Bill 322 creates a water quality certification program for nonfederal wetlands in Wisconsin. Under the bill, a wetland is identified as a “nonfederal wetland” if either of the following applies: (1) any discharges of dredged or fill material into the wetland is not subject to regulation under 33 U.S.C. s. 1344 due to the *SWANCC*¹ decision or subsequent interpretations of that decision by a federal agency or by a federal district court or federal appellate court that apply to wetlands located in Wisconsin; or (2) the wetland is a nonnavigable, intrastate and isolated wetland under *SWANCC* or subsequent interpretations of that decision by a federal agency or by a federal district court or federal appellate court that apply to wetlands located in Wisconsin. Assembly Substitute Amendment 1 to the bill is described below.

TIME LIMITS FOR WATER QUALITY DETERMINATIONS FOR WETLANDS

The substitute amendment directs the Department of Natural Resources (DNR) to establish by rule time limits for processing, approving, and denying applications for water quality certifications for nonfederal wetlands and for other determinations applicable to wetlands the DNR makes regarding compliance with water quality standards under ch. NR 103, Wis. Adm. Code. Upon referral of the proposed rule to the presiding officers of each house of the legislature, the presiding officers are directed to refer the proposed rule to a senate committee and an assembly committee concerned with the environment.

¹ The U.S. Supreme Court issued the *SWANCC* decision [*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. Jan. 9, 2001)] on January 9, 2001. Additional information on this decision is available in Legislative Council Legal Memorandum LM-2001-1, *U.S. Supreme Court Case on Wetlands*, January 25, 2001.

DEFINITIONS

“Additional Federal Law” and “Existing Federal Law”

The substitute amendment provides that “additional federal law” means any of the following: (1) an amendment to 33 U.S.C. s. 1344 (f) [s. 404 (f) of the Clean Water Act] that becomes effective after January 9, 2001; (2) any other federal statutory provision that affects the exemptions under 33 U.S.C. s. 1344 (f) and that becomes effective after January 9, 2001; (3) a regulation, rule, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that: (a) is promulgated or adopted under 33 U.S.C. s. 1344 (f) or used to interpret or implement that provision; (b) applies to wetlands located in Wisconsin; and (c) is effective after January 9, 2001; and (4) a decision issued by a federal district or federal appellate court that: (a) affects the application of a federal amendment or provision in the preceding three points; (b) applies to wetlands located in Wisconsin; and (c) is issued after January 9, 2001.

The substitute amendment also provides that “existing federal law” means any of the following: (1) 33 U.S.C. s. 1344 (f), as amended to January 8, 2001; (2) a regulation, rule, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that: (a) is promulgated or adopted under 33 U.S.C. s. 1344 (f) or used to interpret or implement 33 U.S.C. s. 1344 (f); (b) applies to wetlands located in Wisconsin; and (c) is in effect on January 8, 2001; and (3) a decision issued by a federal district or federal appellate court that: (a) affects the application of a federal amendment or provision in the preceding two points; (b) applies to wetlands located in Wisconsin; and (c) is issued on or before January 8, 2001.

“Governmental Unit”

Under the substitute amendment, a definition of “governmental unit” replaces the definition of “local governmental unit” used in the bill. As used in the substitute amendment, “governmental unit” means the federal government, the state, a city, village, county, or town.

RULES FOR EXEMPTIONS

Whenever the DNR initially incorporates an additional federal law or interpretation into the rules promulgated to interpret and implement the Clean Water Act-based exemptions [33 U.S.C. s. 1344 (f)], the substitute amendment authorizes the DNR to modify the additional federal law or interpretation as the DNR determines is necessary.

RULES PROHIBITION--PRACTICABLE ALTERNATIVES

Under the substitute amendment, if the area to be filled is less than one acre in size and a governmental unit has determined that the discharge is necessary for public safety, the DNR may not establish or enforce a rule requiring a person applying for a water quality certification under the proposal for the discharge of dredged or of fill material into a nonfederal wetland to submit: (1) a description of practicable alternatives to the discharge; or (2) a description of any investigation conducted to determine the viability of such alternatives.

DNR INSPECTION AUTHORITY

The substitute amendment authorizes an employee or representative of the DNR, upon presentation of his or her credentials and subject to the requirements identified below, to do any of the following for purposes of enforcing the new water quality certification program:

1. Enter and inspect property on which a nonfederal wetland, or part of a nonfederal wetland, is located and for which a water quality certification application has been submitted to the DNR, until the application is denied or withdrawn, or if the application is approved, until the 20th day following the completion of the discharge.
2. Enter and inspect any property on which a nonfederal wetland is located where the DNR has reason to believe that a water quality certification program violation has occurred or is occurring in order to investigate a discharge of dredged or fill material. Before entering the property, the DNR is required to make at least one of the following requests: (a) a request for consent from the proprietor to enter and inspect the property; or (b) an oral or written request that the proprietor provide an explanation, orally or in writing, concerning the activity that the DNR has reason to believe may violate the new program.
 - If the proprietor gives consent to enter and inspect the property, the DNR, upon reasonable advance notice, is allowed to enter and inspect the property in compliance with the terms of the consent.
 - If the proprietor refuses to grant consent to enter or inspect the property, or if the DNR determines that the proprietor's explanation or terms of consent are unacceptable, the DNR is allowed to refer the matter to the Department of Justice for civil enforcement action under s. 299.95, Stats.
 - If the proprietor fails to respond to oral or written requests from the DNR, a DNR agent is allowed to apply for, obtain, and execute a special inspection warrant under s. 66.0119, Stats. The DNR is required to give the proprietor reasonable advance notice of the intent to apply for the special inspection warrant.
 - The DNR may ask to enter or inspect the property, request an oral explanation about the activity the DNR has reason to believe may violate the new program, or execute a special inspection warrant only during reasonable hours.
3. Inspect any records that the DNR requires a water quality certification holder to keep. A DNR employee or representative may not inspect a record kept by a holder of a water quality certification unless the holder, or the holder's designee, is present or unless the holder waives this requirement.

A DNR employee or representative may exercise any of these three inspection options only during reasonable hours and only after DNR has provided reasonable advance notice to the person owning the property involved or to the holder of the water quality certification.

Adoption of Assembly Substitute Amendment 1 was recommended by the Assembly Environment Committee by a unanimous vote on April 24, 2001. Passage of Assembly Bill 322, as amended, was recommended by the Assembly Environment Committee on a vote of Ayes, 6, Noes, 4, on April 24, 2001.

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